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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

KIMBERLY BENSON, KARIMDAD
BALOCH and NEERJA JAIN
GURSAHANEY, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A.,
individually and as successor in interest
of WASHINGTON MUTUAL, INC.,

Defendant.

CASE NO.: CV 09-5272 (EMC)

**DEFENDANT JPMORGAN CHASE
BANK, N.A.'S:**

(1) **NOTICE OF MOTION AND
MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P.
12(b)(6); AND**

(2) **MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

DATE: February 3, 2010
TIME: 10:30 a.m.
PLACE: Courtroom C

*[Declaration of Phillip J. Eskenazi, Request
for Judicial Notice and [Proposed] Order
Filed Concurrently Herewith]*

Complaint Filed: November 5, 2009

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 10:30 a.m. on February 3, 2010 or as soon thereafter as the matter may be heard in Courtroom C of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, Defendant JPMORGAN CHASE BANK, N.A. (“Chase”) will, and hereby does, move the Court for an order dismissing the complaint of Plaintiffs Kimberly Benson, Karimdad Baloch and Neerja Jain Gursahaney (collectively, “Plaintiffs”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹

This Motion is based upon the grounds that Plaintiffs have failed to state a claim upon which relief may be granted as to all of the causes of action they assert: (1) aiding and abetting fraud; (2) aiding and abetting conversion; (3) aiding and abetting a breach of fiduciary duty; (4) conspiracy to commit fraud and conversion; and (5) violation of BUS. & PROF. CODE § 17200 *et seq.* (“UCL”). Plaintiffs’ aider and abettor claims fail because Plaintiffs fail to allege with particularity that Washington Mutual Bank (“WaMu”), Chase’s alleged predecessor in interest, had actual knowledge of the alleged specific, primary wrong or that WaMu substantially assisted in the perpetration of the underlying Ponzi scheme at issue. Plaintiffs’ conspiracy claim fails because Plaintiffs fail to plead knowledge and intent or an agreement with particularity. Plaintiffs’ UCL claim fails because it is predicated upon the alleged purchase of “securities” and further, Plaintiffs fail to plead the requisite causal connection between WaMu’s alleged misconduct and their injuries. Finally, all of Plaintiffs’ claims fail because none is plausible under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice and

¹ Chase brings this Motion in the event that the Court does not grant its concurrently filed Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a) and the doctrine of judicial comity.

1 Declaration of Phillip J. Eskenazi filed concurrently herewith, all pleadings and papers
2 on file, and upon such oral argument as may be made at the hearing on this Motion.

3
4 Dated: December 23, 2009

By: /s/ Phillip J. Eskenazi

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MEMORANDUM OF POINTS AND AUTHORITIES

In the event the Court does not grant its concurrently filed Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a) and the doctrine of judicial comity, Chase hereby moves to dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

This case arises out of the alleged "Ponzi" scheme that is the subject of *Securities and Exchange Commission v. Millennium Bank, et al.*, Case No. 7:09-CV-00050-0, pending in the United States District Court, Northern District of Texas. According to Plaintiffs, UT of S, LLC and related entities and individuals (collectively, "UTS") fraudulently induced Plaintiffs and others to invest in bogus certificates of deposit issued by Millennium Bank.

With respect to Chase, Plaintiffs effectively allege that Washington Mutual Bank ("WaMu") is liable for losses they incurred in the Ponzi scheme because WaMu allowed UTS to maintain account(s) from which UTS conducted its business. For that reason, Plaintiffs allege that WaMu is liable for Plaintiffs' losses under claims for: (a) aiding and abetting fraud and fraudulent concealment; (b) aiding and abetting conversion; (c) aiding and abetting breach of fiduciary duty; (d) conspiracy; and (e) violation of BUS. & PROF. CODE §17200, *et seq.* Finally, Plaintiffs allege that Chase is the successor to WaMu, and it therefore is responsible for WaMu's alleged wrongdoing.²

Although each claim fails for all of the reasons set forth below, they share a common problem -- the inability of Plaintiffs to allege that WaMu had actual knowledge of the wrongdoing and agreed to participate. This same defect recently resulted in the dismissal of a virtually identical claim by Judge O'Connor in the

² Under the terms of a September 25, 2008 agreement between Chase and FDIC as receiver for WaMu, Chase acquired certain assets of WaMu. Chase, however, is *not* the successor of WaMu.

Northern District of Texas.³ More specifically, Plaintiffs' Class Action Complaint ("Comp.") fails to state a claim upon which relief can be granted for several reasons:

first, Plaintiffs' aider and abettor claims fail because:

- (a) Plaintiffs fail to allege with particularity that WaMu had actual knowledge of the alleged specific, primary wrong -- that Plaintiffs fraudulently had been induced to invest in a Ponzi scheme operated by UTS; and
- (b) Plaintiffs fail to allege with particularity that WaMu substantially assisted UTS with its Ponzi scheme;

second, Plaintiffs' conspiracy claim fails because:

- (a) Plaintiffs fail to plead knowledge and intent with particularity; and
- (b) Plaintiffs fail to plead an agreement with particularity;

third, Plaintiffs' UCL claim fails because:

- (a) the certificates of deposit allegedly purchased by Plaintiffs are securities, and the UCL therefore is inapplicable; and
- (b) Plaintiffs fail to plead WaMu's knowledge of and participation in the statutory violation; and

fourth, all of Plaintiffs' claims fail because none is plausible.

For those reasons, Chase respectfully requests that the Court dismiss the Complaint.

II. ARGUMENT

A. Plaintiffs must plead particularized facts, not conclusions, to state a claim that is plausible.

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is

³ In *Litson-Gruenberg v. JPMorgan Chase & Co.*, No. 7:09-CV-00056 (N.D. Tex. Dec. 16, 2009), the court dismissed the same aider and abettor claims against Chase arising out of the Millennium Bank Ponzi scheme. A copy of the Amended Complaint and Memorandum Opinion and Order in *Litson-Gruenberg* are attached as Exhibits "9" and "10" to Chase's Request for Judicial Notice, filed concurrently herewith.

1 plausible.” *Twombly*, 550 U.S. at 570; *Ashcroft*, 129 S.Ct. at 1949. A court is to
2 disregard all factual and legal conclusions. *Id.* Instead, the court is to determine
3 whether the well-pleaded facts permit the court, drawing on its judicial experience and
4 common sense, to infer more than a mere possibility of misconduct. *Ashcroft*, 129
5 S.Ct. at 1950; *Twombly*, 550 U.S. at 555.

6 In *Ashcroft*, the plaintiff, a post-September 11 detainee, alleged that Attorney
7 General Ashcroft and FBI Director Mueller “knew of, condoned, and willfully and
8 maliciously agreed . . . to subject the plaintiff to harsh confinement conditions because
9 of his race, religion, and/or national origin.” *Ashcroft*, 129 S.Ct. at 1951. The Court
10 acknowledged that, if that allegation were accepted as true, the plaintiff would have
11 stated a viable claim. *Id.* But, the Court held that the complaint failed to state a claim
12 because the actual knowledge allegation “amount[ed] to nothing more than a
13 ‘formulaic recitation of the elements’ of a constitutional discrimination claim.” *Id.*

14 The Court also concluded that the claims alleged by the plaintiff were not
15 plausible. More specifically, the Court held that plaintiff’s allegations showed only
16 that Ashcroft and Mueller *conceivably* had actual knowledge of plaintiff’s treatment.
17 *Id.* Having failed to allege specific facts that “nudg[ed] his claim across the line from
18 conceivable to plausible,” the Court concluded that the plaintiff’s allegations failed.
19 *Id.* at 1952.

20 In the present case, Plaintiffs must allege *more* than that required of the
21 *Ashcroft* plaintiff. All of Plaintiffs’ claims sound in fraud. Accordingly, Plaintiffs’
22 claims are governed by Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125
23 (9th Cir. 2009) (all claims “grounded in fraud” or “sound[ing] in fraud” are governed
24 by Rule 9(b)). Rule 9(b) requires Plaintiffs to plead, with particularity, the who, what,
25 when, where, and how of the alleged fraud and aiding and abetting. *Id.* at 1124.
26 Thus, Plaintiffs “must set forth *more* than the neutral facts necessary to identify the
27 transaction.” *Id.* (emphasis in original).
28

B. The Complaint fails to state aider and abettor claims.

Under California law, liability may be imposed for aiding and abetting an intentional tort if the person: (a) knows the other person's conduct constitutes a breach of duty; and (b) gives substantial assistance or encouragement to the primary wrongdoer. *Casey v. U.S. Bank Nat. Assn.*, 127 Cal. App. 4th 1138, 1144 (2005); *Litson-Gruenberg*, slip op. at 3 (citing *Chance World Trading E.C. v. Heritage Bank of Commerce*, 438 F. Supp. 2d 1081, 1084 (N.D. Cal. 2005)). Plaintiffs fail to plead either element in compliance with Rule 9(b) or Rule 8.

1. Plaintiffs fail to allege with particularity that WaMu had actual knowledge of the specific, primary wrong and made a conscious decision to participate.

California law requires a showing that the defendant had actual knowledge of the *specific, primary wrong*, *Casey*, 127 Cal. App. 4th at 1144 (citing *Lomita Land Water Co. v. Robinson*, 154 Cal. 36, 47 (1908)), and a showing that WaMu made a conscious decision to participate in UTS' Ponzi scheme. *Howard v. Superior Court*, 2 Cal. App. 4th 745, 748-49 (1992) ("Aiding and abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct . . . [which] necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act."); *see also Litson-Gruenberg*, slip op. at 4 ("The words aid and abet . . . may fairly be construed to imply an intentional participation with knowledge of the object to be obtained.") (quoting *Casey*).

Suspicion or knowledge of general wrongdoing or "skullduggery" is not enough. *Casey*, 127 Cal. App. 4th at 1144; *Litson-Gruenberg*, slip op. at 4 (citing *Chance World*, 438 F. Supp. 2d at 1084-85). Likewise, a plaintiff "cannot rely on inferences drawn from the sloppy work by [the bank]" *Chance World*, 438 F. Supp. 2d at 1085-86. Indeed, in the context of banking activity, requiring more than suspicion and sloppy work is particularly appropriate because banks have no duty to

1 non-customers to investigate or report suspicious activities. *Burns v. Neiman Marcus*
 2 *Group, Inc.*, 173 Cal. App. 4th 474, 498 (1999).

3 In *Casey*, the plaintiff brought aider and abettor claims against a number of
 4 banks for their alleged participation in a scheme by a company's officers and directors
 5 to divert more than \$36 million in company funds for their personal benefit. 127 Cal.
 6 App. 4th at 1141. Thus, the "specific, primary wrong" was the alleged looting of the
 7 company.

8 In support of his claims, the plaintiff alleged that the banks, among other things:
 9 (1) allowed its customers to open accounts with invalid tax identification numbers; (2)
 10 allowed its customers to use the accounts to drain funds from the company to accounts
 11 of the individual directors, officers, their families, and affiliated companies;
 12 (3) allowed large sums of cash, often in excess of \$250,000 and aggregating
 13 approximately \$6 million, to be taken out of the bank in unmarked duffel bags;
 14 (4) ignored violations of banking regulations and the bank's own internal policies and
 15 procedures; (5) paid obviously forged negotiable instruments; and (6) ignored
 16 monetary restrictions printed on the face of checks (*i.e.*, "not to exceed") by paying
 17 sums in excess of the limits. *Id.* at 1142. The *Casey* court concluded that those
 18 allegations failed to state an aider and abettor claim. *Id.* at 1153.

19 According to the *Casey* court, although the plaintiff's complaint provided
 20 "ample details of the bank's improper conduct in their business dealings with the
 21 [account holders], the complaint fail[ed] to establish that the banks had actual
 22 knowledge of the primary violation in which they purportedly participated." *Id.* at
 23 1148. It was insufficient for the plaintiff to allege that "the banks knew something
 24 fishy was going on . . ." or that the banks, with proper oversight in compliance with
 25 banking regulations, should have learned of the fraud. *Id.* at 1149. Instead, to state a
 26 claim, the plaintiff was required to allege non-conclusory facts showing that the banks
 27 had actual knowledge that the account holders were stealing the company's funds.
 28 *Casey*, 127 Cal. App. 4th at 1149.

1 In *Chance World*, another court sitting in this very District followed *Casey* and
 2 entered judgment for a bank that had violated its internal policies and allowed its
 3 customer to steal the plaintiff's funds without the required signatures to make
 4 withdrawals for an account at the bank. 438 F.2d at 1087. Other courts have
 5 dismissed aider and abettor claims against banks and other financial institutions for
 6 the similar reasons.⁴

7 At most, Plaintiffs allege nothing more than sloppy banking practices by WaMu
 8 that allegedly violated banking regulations requiring the reporting of suspicious
 9 activities:

- 10 ■ “[g]iven the *lack of oversight or apparent concern* about
 11 Wise’s suspicious activities” (Comp. at 21)
 (emphasis added);
- 12 ■ “WaMu . . . had *no methodology or policy* in place to
 13 prevent or detect money laundering” (Comp. at 23)
 (emphasis added);
- 14 ■ “[w]ith respect to the Nevada LLC’s, such an audit *would*
 15 *have, at a minimum, investigated*” (Comp. at 24)
 (emphasis added); and
- 16 ■ the OTS imposed a Consent Order on WaMu “for *poor,*
 17 *sloppy, inadequate and, in some instances, non-existent*
 18 controls relating to compliance with the U.S. anti-money
 19 laundering statutes” (Comp. at 21) (emphasis added).

20 Sloppy banking practices, however, do not equate with actual knowledge of the
 21 fraud. *Chance World*, 438 F. Supp. 2d at 1084. Similarly, allegations regarding
 22 violations of banking regulations do not constitute an allegation of actual knowledge.
Id.; *Casey*, 127 Cal. App. 4th at 1151.⁵

23 ⁴ *Litson-Gruenberg*, slip op. at 5; *In re Sharp Intern. Corp.*, 281 B.R. 506, 515 (Bankr.
 24 E.D.N.Y. 2002) (dismissed aider and abettor claims relating to the looting of corporate assets even
 25 though the bank allegedly had confirmed its “long held suspicions that the [officers] were engaged in
 fraudulent conduct on a major scale . . . ,” because there was no allegation that the bank actually
 knew of the specific wrong).

26 ⁵ Banking regulations such as the Bank Secrecy Act do not create private rights of action.
 27 *Wuliger v. Liberty Bank, N.A.*, 2004 WL 3377416 (N.D. Ohio Mar. 4, 2004); *Martinez Colon v.*
 28 *Santander National Bank*, 4 F. Supp. 2d 53 (D. Puerto Rico 1998); *Grees v. PNC Bank, N.A.*, 100
 F. Supp. 2d 289 (E.D. Penn. 2000); *Aiken v. Interglobal Mergers & Acquisitions*, 2006 WL 1878323
 (S.D.N.Y. July 5, 2006); *Marlin v. Moody National Bank*, 2006 WL 2382325 (S.D. Tex. Aug. 16,
 2006); *Medical Supply Chain, Inc. v. U.S. Bancorp.*, 2003 WL 21479192 (D. Kan. June 16, 2003);

Moreover, allegations regarding WaMu's lack of oversight or controls are the antithesis of actual knowledge. That WaMu might have learned of UTS' activities if it properly had overseen the UTS accounts is, at most, a "should have known" allegation.⁶ Whether WaMu should have known of the Ponzi scheme is irrelevant.

Plaintiffs further make a number of allegations that WaMu ignored facts that, according to Plaintiffs, might have aroused suspicion. *See* Comp. at 20 (WaMu "knew that hundreds millions of dollars in investor funds were flowing into the account and then being wired [out] . . ."); 22 (discussing examples of account activity "that should raise red flags . . ."); 23 (WaMu knew that UTS was an affiliate of a bank licensed in St. Vincent and the Grenadines which are "on the Financial Action Task Force's list of non-cooperative countries and territories"); 18 (taking receipt of checks "in large bulks physically delivered . . ." to WaMu); and 19 (allegations regarding Wise's payments on his credit cards and expenses relating to Wise's personal jet). But, allegations that WaMu knew "something fishy was going on" do not rise to sufficient allegations of actual knowledge of the primary, underlying wrong. *Casey*, 127 Cal. App. 4th at 1149; *compare id.* at 1142 (customer carrying large sums of cash out of bank in an unmarked duffel bag, etc., does not allege actual knowledge). The allegations in this case pale in comparison to the allegations in *Casey*.

The *Litson-Gruenberg* court examined and dismissed the same allegations against Chase arising out of the Millennium Bank Ponzi scheme.

and *Quinn v. United States*, 2003 WL 22133715 (W.D. Okla. July 10, 2003). Stripped to their essence, Plaintiffs' claims are nothing more than attempts to assert civil claims under those regulations.

⁶ Plaintiffs allege that, in connection with the provisioning to UTS of cash management software and remote deposit hardware, WaMu "purportedly" conducted an audit. Comp. at 23-25. That audit, according to Plaintiffs, would have included an investigation into the nature of UTS' business, its industry, its financial strength, whether UTS was authorized to sell securities, number of employees, and the account activity. *Id.* at 24-25. Plaintiffs do not allege that such an audit was conducted. Plaintiffs also do not allege, nor could they, that such an audit, if it had been conducted, *in fact* revealed that UT of S fraudulently was inducing people to invest in bogus certificates of deposit issued by Millennium Bank.

Indeed, after a thorough review of Plaintiff's asserted facts that she contends establish actual knowledge, the Court fails to identify factual formulations that constitute actual knowledge. Plaintiff fails to allege that Defendant [Chase] knew the Ponzi defendants were making false representations or stealing the investors' money based on the Ponzi defendants' representations. In essence, the allegations are an artful manner of stating that Defendant should have known of the Ponzi defendants' actions. Plaintiff's factual narrative is, at best, merely a story of suspicious activity that Plaintiff contends should have provided Defendant notice of the Ponzi scheme. As such, this is not sufficient to satisfy the requirement of actual knowledge for aider and abettor liability. *Neilson*, 290 F.Supp.2d at 1118-1119.

Litson-Gruenberg, slip op. at 5. Plaintiffs' complaint fails for the same deficiency.

2. Plaintiffs have failed to plead with particularity that WaMu provided substantial assistance.

With respect to the substantial assistance element, Plaintiffs must allege with particularity how WaMu's alleged assistance was a substantial factor in bringing about their injury. *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1130 n. 81 ("The acts or omissions that comprise the necessary substantial assistance must be pleaded with specificity."). "Unadorned allegations" that the defendant provided substantial assistance are not enough. *Id.*

In this regard, Plaintiffs must allege not only what WaMu did to assist UTS in the alleged Ponzi scheme, but also how its assistance proximately caused the harm on which the primary liability is predicated. *Id.*; *Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). Without a particularized showing of proximate cause, Plaintiffs have not pled substantial assistance. *Id.*

Plaintiffs' complaint is insufficient on both fronts. The totality of Plaintiffs' allegations in this regard is that WaMu received deposits and allowed withdrawals. Recognizing that WaMu had no duty to investigate or report suspicious activities, the clearing of transactions through WaMu is not substantial assistance.⁷

⁷ Chase is mindful of the conclusion reached in *Casey* and other cases that "ordinary business transactions" provided by a bank can be considered substantial assistance if the bank actually knew the transactions were assisting the customer in committing a specific tort. However, that conclusion,

Moreover, the alleged assistance provided by WaMu was not “‘a substantial factor’ in bringing about the injury purportedly suffered by . . .” Plaintiffs. *Neilson*, 290 F. Supp. 2d at 1129. Plaintiffs do not allege that WaMu had any role in the publication or creation of the advertisements that allegedly induced Plaintiffs to invest in the Ponzi scheme or assisted UTS in any way other than normal banking activities. *Compare Neilson*, 290 F. Supp. 2d at 1129 (bank helped induce investments and served as a reference for its customer); *Marcelos v. Dominguez*, 2008 WL 2788173, at *9-10 (N.D. Cal. July 18, 2008) (aider and abettor defendants, a title company and lender, drafted and obtained plaintiff’s signature on fraudulent loan documents).

Plaintiffs also allege no direct contact between WaMu and Plaintiffs. *Compare Marcelos*, 2008 WL 2788173, at *9 (distinguishing *Casey* because, in that case, the banks had no direct dealings with the plaintiffs, but, in *Marcelos*, the defendants had a relationship with the plaintiff and were accused of defrauding the plaintiff directly). Here, the harm was caused solely by the fraud allegedly committed by UTS. Plaintiffs would be in the same position if they had sent funds to any bank or directly to UTS. Accordingly, Plaintiffs fail to allege substantial assistance.

C. Plaintiffs’ conspiracy claim fails to state a claim upon which relief can be granted.

As with their other claims, Plaintiffs rely upon conclusory allegations to support their conspiracy claim. Under *Ashcroft* and *Twombly*, as well as Rule 9(b), such allegations are inadequate either to allege the requisite agreement or the requisite intent.

1. Plaintiffs fail to plead adequately that an agreement existed.

To survive dismissal, Plaintiffs must plead more than conclusory assertions of a “conspiracy” or an “agreement.” *Brant v. Kipp*, 2009 WL 1444691 at *19 (C.D. Cal. May 21, 2009). Plaintiffs must “provide the particulars of when, where, or how the

if applied without limits, would conflate the two elements of aiding and abetting, and ignore the word “substantial” in the “substantial assistance” element of the tort. Chase submits that simple debits and credits in an account are not substantial assistance as a matter of law.

1 alleged conspiracy occurred.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107
 2 (9th Cir. 2003). Failure to do so warrants dismissal.

3 For example, in *Brant*, the court dismissed a conspiracy claim that was based on
 4 the “conclusory allegation that the defendants ‘conspired and agreed to’ do certain
 5 things, including defraud Plaintiff.” *Id.* at *19. The court found that the absence of
 6 “specific, factual allegations” rendered the complaint defective supporting the
 7 existence of an agreement even under the notice pleading of Rule 8(a), much less the
 8 heightened standard of Rule 9(b). *Id.*; *see also Vess*, 317 F.3d at 1107 (affirming
 9 dismissal of a fraudulent conspiracy claim which failed to “provide the particulars of
 10 when, where, or how the alleged conspiracy occurred.”).

11 Plaintiffs’ allegations fare no better than those pled in *Brant* and *Vess*. Like the
 12 plaintiff in *Brant*, Plaintiffs plead only the bare assertion of an agreement: “Defendant
 13 entered into an agreement with the unnamed co-conspirators to commit the wrongful
 14 acts alleged herein.” Comp. ¶ 118. And like the plaintiff in *Vess*, Plaintiffs fail
 15 entirely to “provide the particulars of when, where, or how the alleged conspiracy
 16 occurred.” There are no facts as to whom within WaMu reached an agreement with
 17 UTS or the other alleged conspirators to defraud investors, when such agreement took
 18 place, what benefits WaMu obtained from such agreement, or what acts WaMu agreed
 19 to perform. Accordingly, Plaintiffs fail to state a conspiracy claim.

20 **2. Plaintiffs fail to allege the requisite knowledge and intent.**

21 To state a claim for conspiracy, Plaintiffs must also allege facts showing that
 22 WaMu had “knowledge of the planned tort . . . combined with intent to aid in its
 23 commission.” *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th 1571, 1582
 24 (1995). Moreover, “conspiracies cannot be established by suspicions [and] . . . mere
 25 association does not make a conspiracy.” *Id.* Thus, the analysis as to this claim is
 26 virtually identical to the analysis of Plaintiffs’ aider and abettor claim, and it fails for
 27 the same reasons.
 28

As explained above, although Plaintiffs allege in conclusory fashion that WaMu was aware of the fraud, their factual allegations show nothing more than suspicious activities that might have alerted WaMu of the Ponzi scheme. Because suspicions and/or assistance provided without wrongful intent are inadequate (*id.*), the Court should dismiss Plaintiffs' conspiracy claim.

D. Plaintiffs' allegations fail to state a claim under the UCL.

1. Because the certificates of deposit allegedly purchased by Plaintiffs are securities, Plaintiffs fail to plead a UCL claim upon which relief can be granted.

Both California and federal law include "certificates of deposit" under the definition of a "security." CAL. CORP. CODE § 25019; 15 U.S.C. § 77b(1). Section 17200, however, does not apply to securities transactions. *Bowen v. Ziasun Technologies, Inc.*, 116 Cal. App. 4th 777, 790 (2004) (affirming dismissal of UCL claim by investors who claimed that brokerage firms tricked them into investing in a Ponzi scheme); *see also Shearson Lehman Bros. v. Greenberg*, 60 F.3d 834, 836 (9th Cir. 1995) (affirming dismissal of UCL claim and noting that "Cal. Bus. & Prof. Code § 17200 is inapplicable to securities transactions"); *Scognamillo v. Credit Suisse First Boston LLC*, 2005 WL 2045807, at *36-37 (N.D. Cal. Aug. 25, 2005) (dismissing UCL claim and noting that "several courts have concluded that section 17200 does not apply to securities transactions, and it appears that no court has held to the contrary.").⁸

The claim in *Bowen* virtually was identical to the claim here. Two investor plaintiffs brought UCL claims alleging that a brokerage firm tricked them into purchasing stock in a "pyramid" scheme. *Id.* Because the plaintiffs' investments were in securities, the court of appeals affirmed the trial court's dismissal. The Court should dismiss the UCL claim in this case for the same reason. *Id.*

⁸ *See also Dietrich v. Bauer*, 76 F. Supp. 2d 312, 351 (S.D.N.Y. 1999) (same); *Perera v. Chiron Corp.*, 1996 WL 251936, at *5 (N.D. Cal. May 8, 1996) (same).

1 There is no reason to deviate from the holding in *Bowen* here. There is ample
 2 protection afforded to victims of securities fraud by the securities laws. The UCL was
 3 intended for other purposes and should not be applied here.

4 **2. Plaintiffs fail to plead the requisite causal connection between**
 5 **WaMu's alleged conduct and their injuries.**

6 Even if Plaintiffs' UCL claim was not precluded because it is based on the
 7 purchase of a security, it is fatally defective because a plaintiff who brings a UCL
 8 claim must allege the defendants: (1) had actual knowledge of the violation, and (2)
 9 took action to aid and encourage that activity. *In re Firearm Cases*, 126 Cal. App. 4th
 10 959, 982 (2005). In *Firearm*, the plaintiffs were several California cities and counties
 11 which brought UCL claims against multiple manufacturers, distributors, and retailers
 12 of handguns, as well as their trade associations. *Id.* at 967-68. The plaintiffs alleged
 13 that the defendants' conduct of distributing firearms in a manner that enabled
 14 criminals to acquire them constituted a pattern of "unfair" conduct which violated the
 15 UCL. *Id.* at 968-69. More specifically, the plaintiffs alleged that the defendants
 16 marketed handguns using practices that encouraged sales to unauthorized users
 17 without adequately monitoring distributors and dealers or setting standards for
 18 distributors and dealers regarding how to sell handguns legally and responsibly. *Id.*
 19 The court rejected the plaintiffs' UCL claim because the plaintiffs did not allege that
 20 the defendants: (1) had actual knowledge that specific retailers were illegally
 21 supplying guns to the criminal gun market; *and* (2) took any action to aid or
 22 encourage that activity. *Id.* at 984-85.

23 *Emery v. VISA Internat. Service Assn.*, 95 Cal. App. 4th 952 (2002) is also
 24 instructive. There, the plaintiff brought a UCL claim against VISA because illegal
 25 foreign lotteries had mailed solicitations to California citizens that allowed for
 26 payment by VISA bank cards. *Id.* at 954-55. The court held that a UCL claim
 27 "cannot be predicated on vicarious liability." *Id.* at 960. Rather, the claim must
 28 contain an element of the defendant's "personal 'participation in the unlawful

practices’ and ‘unbridled control’ over the practices that are found to violate [the UCL].” *Id.* The court found that VISA exercised no control over the acts of those preparing the lottery solicitation and that VISA had no relationship with the merchants who did. *Id.*⁹ Thus, the elements that must be alleged are virtually identical to those required to plead viable aider and abettor and conspiracy claims -- knowledge of the wrong and knowing participation.

Firearm and *Emery* make clear that Plaintiffs have not stated a UCL claim against Chase. Plaintiffs do not, and cannot, allege that WaMu solicited investments in the Ponzi scheme or exercised control over the scheme or was even aware of it. As in *Firearm* and *Emery*, there is “no hint” that WaMu participated or encouraged the investments or that it had any control over the wrongful conduct. Accordingly, Plaintiffs’ UCL claim fails. 126 Cal. App. 4th at 984.

E. Plaintiffs’ allegations are not plausible.

Under *Ashcroft* and *Twombly*, the second prong of the pleading standard is that a plaintiff must state a claim that is plausible. *Ashcroft*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 570.

The plausibility standard is not akin to a “probability requirement,” but it requires more than a sheer possibility that a defendant has acted unlawfully Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of entitlement to relief.”

Twombly, 550 U.S. at 557. Without specific allegations that state a plausible claim for relief, Plaintiffs “[do] not unlock the doors of discovery. . . .” *Ashcroft*, 129 S.Ct. at 1950.

In *Ashcroft*, the Court found the plaintiff’s allegations were not plausible, because the alleged conduct was consistent not only with discrimination, but also with a genuine effort by Ashcroft and Mueller to detain suspected terrorists. 129 S.Ct. at

⁹ The court also rejected the plaintiff’s contention that VISA somehow aided and abetted the illegal conduct by failing to prevent it. *Id.* at 965-66.

1 1952. That Ashcroft's and Mueller's actions *conceivably* could have been driven by
 2 discriminatory intent would be "merely consistent with" liability, and therefore not
 3 plausible. *Id.*

4 Plaintiffs' allegations here also fail under the plausibility standard. Plaintiffs'
 5 allegations with respect to WaMu's activities are consistent with normal account
 6 services -- deposits and withdrawals from bank accounts -- without any knowledge of
 7 wrongdoing. That WaMu conceivably provided those services with knowledge of the
 8 fraud or with suspicion that something was "fishy" is not enough. Thus, Plaintiffs'
 9 allegations stop short of the line between the possibility and probability of entitlement
 10 to relief, and they therefore fail to state a claim upon which relief can be granted.¹⁰

11 12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiffs have failed to plead claims upon which
 14 relief can be granted. Pursuant to Rule 12(b)(6), Chase respectfully requests that the

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 25 ¹⁰ The mere desire to collect fees is no indication of fraudulent intent. *Melder v. Morris*, 27
 26 F.3d 1097, 1104 (5th Cir. 1994) (motive to earn fees is not sufficient to sustain an inference of
 27 fraudulent intent; a contrary conclusion "would make a mockery of Rule 9(b)"). Without some type
 28 of specific, ungeneralized motive, Plaintiffs' claims simply make no sense. Indeed, it "strains
 reason" to assert that WaMu "would jeopardize its reputation [and] subject itself to civil liability . .
 ." simply to earn banking fees from UTS. *In re Philip Serv. Corp. Sec. Lit.*, 383 F. Supp. 2d 463,
 469-70 (S.D.N.Y. 2004); *Melder*, 27 F.3d at 1104, n. 10. Claims based on strained reasoning do not
 meet the plausibility standard.

1 Court dismiss Plaintiffs' claims. Finally, Chase respectfully requests that the Court
2 award it such other and further relief to which it may show itself justly entitled.

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4 Respectfully submitted,

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